IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 08.09.2006

CORAM

THE HONOURABLE MR. JUSTICE R.BALASUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE V.DHANAPALAN

CRL. APPEAL NO. 1217 OF 2004

Deva @ Devarajan .. Appellant/Accused

- Vs -

State by
Inspector of Police
R-7, K.K.Nagar Police Station
Chennai. .. Respondent/Complainant
(Cr.No. 770/2000)

Criminal Appeal filed against the conviction and sentence passed by the learned Principal Sessions Judge, Chennai, in S.C. No.561 of 2000 dated 4.7.2003 as stated therein.

For Appellant : Mr. R.Shanmugam, SC, for
Mr. S.V.Karthikeyan

For Respondent : Mr. N.R.Elango, APP

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED BY V.DHANAPALAN, J.)

The appellant in this appeal stands convicted in S.C. No.561/00 on the file of the Court of Sessions, Chennai, under Section 302 IPC, for which he is charged, tried and convicted to undergo imprisonment for life together with a fine of Rs.1,000/= carrying a default sentence. Hence, he is before this Court in this appeal.

2. Heard Mr.R.Shanmugam, learned senior counsel appearing for the appellant and Mr. N.R.Elango, learned Addl. Public Prosecutor appearing for the State.

3. The prosecution case is that on 6.6.00 at about 5.30 p.m., at Door No.96, 66th Street, 11th Sector, K.K.Nagar, Chennai, the accused, having been fed up with the refusal of the on the deceased Kalpana to marry him, poured kerosene over the said Kalpana and set her ablaze, who died at the Royapettah Government Hospital on the next day and thereby committed the offence punishable under Section 302 IPC. To substantiate their case, the prosecution examined P.W.s 1 to 12 besides marking Exs.P-1 to P-20 and M.O.s 1 to 6. The defence examined one witness as D.W.1.

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4. P.W.1 is the father and P.W.2 is the mother of the deceased, Kalpana. P.W.s 3 and 4 are the sisters of the deceased. P.W.1 is working as a mason and he was living with his wife, P.W.2 and his daughters, the deceased and P.W.s 3 and 4. His wife, P.W.2, was doing 'Chittal' work under one Velu Maistry. He knows the accused. Two weeks prior to the occurrence, the accused, accompanied by Velu Maistry, came to the house of P.W.1 looking for an alliance to marry P.W.4, the daughter of P.W.1. After a week's time, the accused expressed his view that he would like to marry the deceased instead of P.W.4. The deceased refused to such a proposal. On the day of the occurrence, P.W.s 1 to 4 were away from the house attending to their day's work and they returned back from work at about 6.00 p.m. P.W.3 reached home ahead of the other witnesses. The deceased had remained in the house throughout the day. When P.W.3 was on her way to the house, she was informed by one Rukmani that the deceased had suffered burn injuries. P.W.3 reached her house and on enquiring the deceased, the deceased informed her that the accused had come to their house around 5.30 p.m. and asked her to marry him and as she refused, he poured kerosene over her and set her ablaze. P.W.3 informed about what the deceased said to her to P.W.s 1, 2 and 4. Thereafter P.W.1 went to the investigating police station and gave a complaint, which is Ex.P-1. The injured Kalpana was taken to the hospital by P.W.2 accompanied by a police constable.

5. P.W.12 is the Inspector of Police in the investigating police station. At around 6.30 p.m. On 6.6.00, P.W.1 appeared before him and gave the complaint, Ex.P-1, which he received and registered it as a case in his police station crime No.770/00 under Section 307 IPC and prepared printed first information report, Ex.P-13. He deputed, P.W.6 to accompany the injured Kalpana to the hospital. As the condition of the injured was precarious, he sent a requisition to the 23rd Metropolitan Magistrate requesting him to record the dying declaration of the said Kalpana. Thereafter, he went to the scene of occurrence and prepared the observation mahazar, Ex.P-9 and also drew a rough sketch, Ex.P14 in the presence of P.W.10. From the scene of occurrence, he recovered a plastic can, M.O.3, matchbox, M.O.4, ash, M.O.5 and partly burnt cloth, M.O.6 under a mahazar, Ex.P-10. He examined P.W.s 1 to 4 and other witnesses and recorded their statements.

6. The injured Kalpana, on being taken to the Royapettah Government Hospital by the police constable, P.W.6, was examined by the doctor, P.W.7 and he issued the accident register, Ex.P-5. At the time of treatment, P.W.6 informed the doctor that the deceased had suffered the burn injuries at the hands of a known person, who poured kerosene over her and set her ablaze. The injured was then admitted in the emergency ward for treatment of the burn injuries.

7. On the requisition from P.W.12, P.W.11, the 23rd Metropolitan Magistrate, reached the hospital and after ascertaining the fit and conscious statement of mind of the deceased by putting questions to her and in the presence of the doctor, P.W.8 he recorded the judicial dying declaration of the deceased. P.W.8 is the doctor, who certified at the foot of the dying declaration that the injured Kalpana was

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conscious throughout the recording of the said statement. The said dying declaration of the deceased given to P.W.11 is marked as Ex.P-12.

8. P.W.12, continuing with his investigation further, examined witnesses and recorded their statements. On 6.6.00 at about 9.45 p.m., the investigating officer reached Royapettah Government Hospital and examined the deceased. At that time the deceased gave another dying declaration to the investigating officer, which is marked as Ex.P-20. Death intimation was sent by the hospital authorities to the police authorities after the injured Kalpana breathed her last on 7.6.00. On receipt of the death intimation, the investigating officer altered the section of offence to one under Section 302 IPC. The altered printed first information report is Ex.P-15. The altered express report was sent to court as well as to the higher officials. Thereafter, P.W.12 went to the hospital and conducted inquest over the dead body of the deceased in the presence of panchayatadars and witnesses and prepared inquest report, Ex.P-16. He then gave a requisition to the doctor for conducting autopsy.

9. On receipt of the requisition, P.W.5, the Police Surgeon conducted autopsy on the dead body of the deceased. During post-mortem, the doctor found various symptoms as noted by him in Ex.P-3, the post-mortem certificate. The symptoms noted by him are as hereunder :-

> "Extensive mixed burns seen over the head and face, front of neck, front of chest, abdomen, whole of both upper limbs, whole of back including the buttocks, front and back of both thighs including knee joints, back of both legs and the genitalia.
> Epidermal burns seen in both palms and the palmer skin is intact. Heat laceration seen on the inner aspect of both elbows and both inguinal regions. The charred skin has peeled off in most of the areas exposing the underlying inflammed and hyperaemic subcutaneous tissue. Hair all over the body is completely singed.
> Heart : Chambers contained clotted blood.
> Lungs : Markedly oedematous and cyanot. (i.e.) Multiple petichiae seen over the pleural surfaces. C/s. Intensely congested, exudes copious bloodstained frothy fluid.
> Larynx and Trachea : Contained bloodstained frothy fluid.
> Hyoid Bone : Intact.
> Stomach : Contained 400 ml of brown coloured fluid with partly digested cooked food particles. Mucosa – congested.
> Liver, Spleen and Kidneys : C/s. Congested.
> Bladder and Uterus : Empty.
> Brain : Oedematous. Hyperaemic. Surface vessels full. C/s. Shows numerous petichiae."

The doctor opined that the deceased would appear to have died of shock due to extensive burn injuries. Ex.P-4, the toxicology report, would show that no poison was detected.

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10. The evidence of P.W.s 2, 3 and 4 are more or less on the same lines as spoken to by P.W.1. P.W.2 would further state that on the date of the occurrence, she along with P.W.s 1, 3 and 4 were away doing their day's work. She had also deposed that the accused works under one Velu Maistry and in turn she works as 'Chittal' under the accused. On the date of occurrence also she was working under the accused. She finished her work at 6.00 p.m. and she along with P.W.s 1, 3 and 4 were returning home and P.W.3 went home ahead of the others. On reaching her house she came to know that the accused had set fire to her daughter. P.W.3 would also depose along the lines as spoken to by P.W.2. Further she would depose that one Rukmani informed her that her sister had been set fire and on hearing the same, P.W.3 went to her house where the deceased informed her that on her refusing to marry the accused, the accused poured kerosene over her and set fire to her.

11. P.W.12 continued his investigation, examined witnesses and recorded their statements. The accused was arrested in connection with crime No.785/00 on the same police station and on coming to know that he is the accused in the present crime, he was examined by the investigating officer. At that time, the accused gave a voluntary confession statement, the admissible portion of which is marked as Ex.P-7, pursuant to which the accused took the witnesses and the police to his house and produced M.O.1, pant and M.O.2, shirt, which were seized under a mahazar, Ex.P-8. The case properties were sent to court with a requisition, Ex.P-17 to subject the same for chemical analysis. Accordingly, the case properties were subjected to chemical examination and Exs.P-18 and P-19 are the serologist's report and chemical examiner's report respectively. He examined the 23rd Metropolitan Magistrate on 9.6.00, who recorded the dying declaration of the deceased. After completing all the legal formalities, P.W.12 filed the final report against the accused under Section 302 IPC on 25.7.00.

12. The accused was questioned under Section 313 Cr.P.C. on the basis of the incriminating materials made available against him. He denied each and every circumstance put up against him as false and contrary to facts. The defence examined one witness as D.W.1. D.W.1 would depose that he along with the accused and the prosecution witnesses were working under one Velu Maistry. They have been working under Velu Maistry for the past three years. On the day of the occurrence, they were working under Velu Maistry. At about 6.50 or 7.00 p.m., a person came and informed Velu Maistry that the deceased had suffered burn injuries. Hearing the news, Velu Maistry asked the accused to accompany him to the house of P.W.1. Accordingly, the accused accompanied the said Velu Maistry to the house of P.W.1.

13. Mr.R.Shanmugam, learned senior counsel appearing for the appellant would contend that the prosecution has not proved its case beyond all reasonable doubt. He would further contend that the case of the prosecution rests entirely on the dying declaration given by the accused to P.W.3 at the first instance and, thereafter to P.W.11 and P.W.12 and those dying declarations suffer from material inconsistencies and, therefore, it would be highly unsafe to place

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reliance upon those dying declarations to find the accused guilty. He would contend that in P.W.12, the dying declaration given to P.W.11, the Metropolitan Magistrate, the deceased had stated that the accused brought a can with him and on she refusing to marry him, he poured kerosene over her and set her ablaze, whereas in the dying declaration, Ex.P-20, given to P.W.12, the investigating officer, the deceased had stated that on her refusing to marry the accused, the accused went inside the house and brought the kerosene, which he poured over her and set her ablaze. He would also further contend that the address regarding the place of occurrence is also inconsistent in both the dying declarations given to P.W.11 and P.W.12. In Ex.P-12, the dying declaration given to P.W.11 the address is mentioned as Door No.90, Ponnambalam Road, K.K. Nagar, Chennai, whereas in Ex.P-20 the address is mentioned as Door No.96, 66th Street, 11th Sector, K.K. Nagar, Chennai. This variation in the address in both the above dying declarations casts a doubt as to whether the place of occurrence would be the one as putforth by the prosecution. Learned senior counsel would further contend that from the evidence of P.W.2, it would be very clear that the accused could not have been at the place of occurrence at the time of occurrence as it is the evidence of P.W.2 that she was working under the accused on the day of occurrence and she left her work at about 6.30 p.m. on that day. Thus, the prosecution has failed to prove the involvement of the accused beyond all reasonable doubt and, therefore, the conviction of the accused under Section 302 IPC has to be necessarily set aside.

14. Mr. N.R.Elango, learned Addl. Public Prosecutor appearing for the State, on the inconsistencies pointed out by the learned senior counsel, would submit that the inconsistencies pointed out by the learned senior counsel are peripheral in nature. He would further add that so long as there is no inconsistency in the crux of the prosecution case, inconsistencies in the irrelevant material would not vitiate the prosecution case. By taking us through the oral evidence of P.W.s 1 to 4 and also the medical evidence, learned Addl. Public Prosecutor would contend that the prosecution has established that deceased had died due to the burn injuries suffered by her and that the plea of alibi putforth by the accused has no legs to stand, since the evidence of P.W.2 does not support the plea of alibi as she has not whispered a word in her evidence, either in chief or in cross that the accused was available at the work spot throughout the day. In the absence of any material to substantiate the plea of alibi, the accused is not entitled to an acquittal at the hands of the court. He would further contend that the discrepancy in the address found in Exs.P-12 and P-20 would not in any way affect the substratum of the prosecution case, so long as the dying declaration given by the deceased, which is free from any doubt, is held to be acceptable. Hence, learned Addl. Public Prosecutor would submit that the judgment of the trial court has got to be sustained.

15. The prosecution has established the cause of death of the deceased through the evidence of the doctor, P.W.5 and the post-mortem certificate, Ex.P-3. The doctor has opined that death is due to extensive burns. Therefore, there could be no dispute that the deceased died on account of the burn injuries. The question that

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comes up for our consideration is as to who caused the burn injuries on the deceased.

16. P.W.1 is the father of the deceased and P.W.s 2, 3 and 4 are the mother and sisters of the deceased. Their evidence on how the deceased came to suffer the burn injuries is more or less the same. In fact, to P.W.3, who came to the house well before P.W.s 1, 2 and 4, the deceased had informed her that the accused had come to their house and asked her to marry him and since she refused, he poured kerosene over her and set fire to her. The deceased had given a similar statement to P.W.s 1, 2 and 4 on their reaching their house. Thereafter, P.W.1 had gone to the police station and had given the complaint, whereby the law was set in motion.

17. P.W.12 is the investigating officer, who on seeing the precarious condition of the deceased had requested the 23rd Metropolitan Magistrate, P.W.11 to record the dying declaration of the deceased. Accordingly, P.W.11 went to the hospital and after ascertaining about the conscious state of mind of the deceased had recorded her dying declaration, which is Ex.P-12. P.W.12, the investigating officer had thereafter gone to the hospital and to him too, the deceased had given a dying declaration, which he recorded and the same is Ex.P-20. Learned senior counsel for the appellant strenuously contends that in Ex.P-12 the deceased had stated that the appellant brought the kerosene can and he poured kerosene over her and set her ablaze, while in Ex.P-20, the statement given to the investigating officer, P.W.12, the deceased has stated that on her refusal to marry, the accused went inside the house and brought the kerosene can and poured kerosene over her and set her ablaze. Even at the threshold, we may state that this would have been an inadvertent slip made by the deceased. We may say so because, the accused is residing at Santhome, while the deceased is residing at K.K. Nagar and the distance between the two places would be around 20 kms. and, therefore, the accused would have definitely not gone all the way to Santhome from K.K.Nagar once again to bring the kerosene can. Hence, that part of the argument advanced by the learned senior counsel has to be answered in the negative.

18. The other point argued by the learned counsel is that the address mentioned in Ex.P-12 and Ex.P-20, the dying declarations recorded by P.W.11 and P.W.12 regarding the place where the occurrence took place are different and, therefore, the case putforth by the prosecution is highly doubtful. We perused the rough sketch, Ex.P-14, prepared by the investigating officer regarding the scene of occurrence. From the rough sketch, it could be seen that Door No.96, 66th Street, 11th Sector, K.K. Nagar, which is the address found in Ex.P-20, the dying declaration recorded by the investigating officer, is just a street perpendicular to Ponnambalam Salai, which is given as the address in the dying declaration, Ex.P-12, recorded by the Metropolitan Magistrate. The Ragavendarar Temple mentioned by P.W.1 in his evidence is just at the other corner of the 66th Street. It is clear from the rough sketch that the places given as address in both the dying declarations, Exs.P-12 and P-20 are in close proximity with each other and, therefore, this point raised by the learned senior

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counsel could only be a feeble attempt made to get out of the offence charged against the accused.

19. The last contention raised by the learned senior counsel is the plea of alibi. Once a plea of alibi is taken by an accused, then it is for him to establish the said fact. The defence of alibi is the best and worst of defence at the same time. They are the best because that if the accused was not there when the deceased was murdered, he could not have murdered her. It is the worst because that once he raises a plea of alibi no other defence is usually open to him.

20. In this case, learned senior counsel, from the evidence adduced by P.W.2 and D.W.1 contends that P.W.2 was working under the deceased on the date of the occurrence and that she left the place of her work around 6.30 p.m. on that day and, therefore, the possibility of the accused being at the scene of occurrence at 5.30 p.m. is highly doubtful. He would also contend that the evidence of P.W.2 finds corroboration from the evidence of D.W.1 let in by the defence. We may, even at the outset, state that the plea of alibi raised by the defence has no legs to stand. P.W.2 has stated in her evidence that she was working under the accused on the day of the occurrence and that after finishing her day's work, she left at 6.30 p.m. Just because she was working under the accused on the day of the occurrence, it cannot be said that the accused was physically present throughout the day and when there is not even a whisper from P.W.2 that the accused was physically present at the place of work during the time of the occurrence, it would be highly unsafe to hold that the accused is not guilty of the offence. The same analogy would also apply to the evidence of D.W.1, who would also state that he along with the accused and P.W.2 used to work under one Velu Maistry and that on the day of the occurrence P.W.2 was working under the accused. Nowhere he has stated that the accused was present physically throughout the day. He has deposed that around 6.50 or 7.00 p.m. some person informed that the deceased had suffered burn injuries and that Velu Maistry asked the accused to accompany him. Just because Velu Maistry, who is not examined in this case, has asked the accused to accompany him to the house of P.W.1, it cannot be stated that the accused would not have been near the house or that he was physically present at the work spot throughout the day. Hence, the plea of alibi raised by the defence has to fall to the ground.

21. Learned Addl. Public Prosecutor placed reliance upon a judgment of the Supreme Court in Godhu & Another - Vs - State of Rajasthan reported in (AIR 1974 SC 2188), wherein the Supreme Court held as under :-

> "It is not correct to hold that if a part of the dying declaration has not been proved to be correct, it must necessarily result in the rejection of the whole of the dying declaration. In cases wherein the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part that it is not possible to sever the two parts, the court would be justified in rejecting the whole of the dying declaration. There may, however, be other cases

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> wherein the two parts of the dying declaration may be severable and the correctness of one part does not depend upon the correctness of the other part. In the last mentioned cases the court would not normally act upon a part of the dying declaration, the other part of which has not been found to be true, unless the part relied upon is corroborated in material particulars by other evidence on record. If such other evidence shows that part of the dying declaration relied upon is correct and trustworthy, the court can act upon that part of the dying declaration despite the fact that another part of the dying declaration has not been proved to be correct."

The above judgment squarely applies to the present case and, therefore, this Court holds that the prosecution case is supported by the oral evidence of P.W.s1 to 4 as well as the medical evidence and also since the part of the dying declaration relied upon is correct and trustworthy and on such trustworthy evidence, the trial court has concluded and convicted the appellant.

22. Having found that the learned senior counsel for the appellant has failed in his endeavour to convince us on his three contentions with regard to (i) material inconsistencies in the dying declarations, (ii) inconsistency in the dying declaration regarding the address of the place of occurrence and (iii) plea of alibi and since he is unable to point out any other illegality or material irregularity in the judgment of the trial court, we find no infirmity with the judgment under challenge and, therefore, it is sustained. The conviction and sentence imposed on the appellant by the trial court is confirmed and the criminal appeal is dismissed.

GLN

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1) The Principal Sessions Judge, Chennai.
2) The District Collector, Chennai.
3) The Director General of Police, Chennai.
4) The Public Prosecutor, High Court, Madras.
5) The Superintendent of Central Prison, Vellore.
6) The Inspector of Police, R-7, K.K. Nagar Police Station, Chennai.

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